FILED
MAR 2 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-652

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, et al.
Petitioners

v.

MUMIA ABU-JAMAL,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

HUGH J. BURNS, Jr.
Chief, Appeals Unit
RONALD EISENBERG
Deputy District Attorney
(counsel of record)
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700

Capital case: Questions presented

1. Can a state court's failure to anticipate a rule not clearly stated by this Court but derived from *Mills* by a federal circuit court be an unreasonable application of "clearly established" federal law?

2. Can a state court ruling amount to an "unreasonable" application of federal law where the state court decision conforms to consistent decisions of federal appellate courts over the course of a decade?

[These questions were presented but left undecided in *Beard v. Banks*, 542 U.S. 406 (2004)]

Table of contents

Questions presented i

Table of authorities iii

Reasons for granting the writ:

1. The grant in *Smith v. Spisak* warrants certiorari in this case. 1

2. Respondent deletes parts of the verdict form to feign a unanimity requirement. 2

3. Deference in name only is not deference. 6

4. The state ruling was consistent with mainstream federal appellate decisions. 8

5. Why this case is important. 13

Conclusion 15

Table of authorities

Federal cases

Abdur'rahman v. Bell, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 534 U.S.970 (2001) 10

Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008) *passim*

Albrecht v. Horn, 485 F.3d 103 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 890 (2008) 8

Banks v. Horn, 271 F.3d 527 (3d Cir. 2001) 1, 4, 7

Beard v. Banks, 542 U.S. 406 (2004) 1, 4, 5, 14

Bell v. Cone, 543 U.S. 447 (2005) 6

Boyde v. California, 494 U.S. 370 (1990) 5

Brown v. Payton, 544 U.S. 133 (2005) 6

Carey v. Musladin, 549 U.S. 70 (2006) 9, 14

Duvall v. Reynolds, 139 F.3d 768 (10th Cir. 1998) 10

Frey v. Fulcomer, 132 F.3d 916 (3d Cir.1997), *cert. denied*, 524 U.S. 911 (1998) 5, 7, 10

Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993) 10

Griffin v. Delo, 33 F.3d 895 (8th Cir. 1994) 10

LaFevers v. Gibson, 182 F.3d 705 (10th Cir. 1999) 11

Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) 12

Lockyer v. Andrade, 538 U.S. 63 (2003) 7

Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991) 10

Mills v. Maryland, 486 U.S. 367 (1988) *passim*

Noland v. French, 134 F.3d 208 (4th Cir.) *cert. denied* 525 U.S. 851 (1998) 10

Parker v. Norris, 64 F.3d 1178 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) 11

Price v. Vincent, 538 U.S. 634 (2003) 7

Rompilla v. Beard, 545 U.S. 374 (2005) 14

Scott v. Mitchell, 209 F.3d 854 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) 10, 11

Smith v. Spisak, 08-724 (pending) 1, 8, 11, 13

Woodford v. Visciotti, 537 U.S. 19 (2002) 7

Yarborough v. Alvarado, 541 U.S. 652 (2004) 7

Yarborough v. Gentry, 540 U.S. 1 (2003) 7

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991) 1, 9

State cases

Commonwealth v. Abu-Jamal, 30 Phila. 1 (1995) 9

Reasons for granting the writ

1. The grant in *Smith v. Spisak* warrants certiorari in this case.

The deference issue here is substantially identical to that in *Smith v. Spisak*, 08-724 (certiorari granted February 23, 2009). *Compare* Ohio petition for certiorari at 17 (arguing that 6th Circuit found *Mills* error due to "implie[d]" mitigation unanimity requirement); 20 (circuit court applied rule not found in *Mills*); 21 and reply brief at 4-5 (arguing that circuit court overturned reasonable state decision, citing *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991)) *with* Commonwealth's petition at 13-14 & n.4, 22 & n.11.

The grant in *Spisak* establishes the importance of the same AEDPA deference issue here. Indeed, this same issue was left unresolved in *Beard v. Banks*, 542 U.S. 406 (2004). The Third Circuit cited and relied on its own merits ruling in *Banks v. Horn*, 271 F.3d 527, 548 (3d Cir. 2001) (which *Banks v. Beard* reversed on other grounds), in deciding this case.

Because proper understanding of AEDPA deference is a national problem, certiorari should be granted.

2. Respondent deletes parts of the verdict form to feign a unanimity requirement.

The jurors in *Mills v. Maryland*, 486 U.S. 367 (1988), were explicitly instructed that they must be unanimous to find mitigation.[1] *No court has ever found* that the jurors *here* were so instructed. The circuit court instead relied on a "risk of confusion" from an "impression" derived from the presence of the word "unanimity" "in close relation to ... discussion of mitigating circumstances." *Abu-Jamal v. Horn*, 520 F.3d at 303 (App. 81).

Yet, surprisingly, respondent now claims that the verdict form "plainly require[d]" jurors "to find each mitigating circumstance unanimously," and purports to show that there was "an express unanimity requirement" on the form (respondent's brief, 9, italics omitted).

Obviously the circuit court would have relied on this supposed "express unanimity requirement" if it existed, but it does not. Respondent invents it by omitting language from the form to imply that an express unanimity instruction was given where none was.

---

[1] *Mills*, 486 U.S. at 378 ("it was clear that the jury could not mark "yes" in any box without unanimity"); 401 (verdict form stated "we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven").

By deleting several sentences and italicizing certain words, respondent seeks to make it appear as if the verdict form said "We, the jury, have found unanimously [that] the mitigating circumstances are..." (respondent's brief, 19 & 27: "We, the jury, have found *unanimously* ... The aggravating circumstance(s) is/are _A_. The *mitigating circumstance(s) is/are* _A_.") (his italics).

But of course the form did not say this.

The verdict form (*see* App. 186-187) required jurors returning a death verdict to unanimously find either that there were aggravating circumstances and no mitigating circumstances, or that aggravating circumstances outweighed any mitigating circumstances. On the form, the word "unanimously" modified these two options (aggravation alone or aggravation of greater weight) -- neither of which addressed how to find mitigating circumstances. Indeed, the latter option required jurors to weigh aggravation against "any" mitigation. The language that respondent replaces with an ellipsis plainly conveyed this, and plainly did not purport to instruct jurors on how to find mitigation (the omitted language is in bold):

> **(2) (To be used only if the aforesaid sentence is death)**
>
> We, the jury, have found unanimously

> **___ at least one aggravating circumstance and no mitigating circumstance. The aggravating circumstance(s) is/are _____.**
>
> _X_ one or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) is/are
> __A_____.
> The mitigating circumstance(s) is/are
> __A_____.

(*compare* respondent's brief, 9).

Respondent's redaction of the form was not what the jurors saw. It is therefore clear *why* no court in this case ever found that there was an express mitigation unanimity requirement – there was none.

When respondent's misrepresentation of the form is corrected, it becomes apparent that his position is really the same as that of the circuit court, which has consistently concluded that "unanimously" modifies "mitigation" *by its mere proximity*. *Abu-Jamal v. Horn*, 520 F.3d at 303 (App. 81) (explaining that word "unanimity" appeared "in close relation" to instructions on mitigation); *Banks v. Horn*, 271 F.3d 527, 548, 550 (3d Cir. 2001), *reversed on other grounds sub. nom. Beard v. Banks*, 542 U.S. 406 (2004) (stating that *Mills* error can arise from

"proximity" of words and concluding that "lead in language" of verdict form, "We the jury have found unanimously," was "confusing" and "suggestive" of "the need for unanimity to find mitigation" such that "by implication" everything that followed had to be found unanimously); *Frey v. Fulcomer*, 132 F.3d 916, 923 (3d Cir.1997), *cert. denied*, 524 U.S. 911 (1998) (followed by circuit court in *Banks*; finding *Mills* error because the word "unanimous" was seven words away from word "mitigating" and so created a "sound bite" such that it was "possible" that a juror would "believe" that mitigation had to be found unanimously).

All of respondent's and the circuit court's arguments ultimately proceed from the premise that wordplay can substitute for an explicit instruction under *Mills*. This broad premise supports a great variety of arguments. *E.g.*, respondent's brief at 9, 15-16 (contending that jurors addressed as "jury" or "you" would understand these words to mean "unanimous jury"). But it is not the premise of *Mills*. There was no mitigation unanimity instruction here, nor would any reasonable juror have understood the (complete) text of the form in the manner suggested by respondent's deletions. *Boyde v. California*, 494 U.S. 370, 381 (1990) (jurors do not "pars[e] instructions for subtle shades of meaning").

"The *Mills* rule applies fairly narrowly." *Beard v. Banks*, 542 U.S. at 420. It holds that the state may not instruct jurors to be unanimous to find mitigating

factors. But the jurors here were never told they must be unanimous to find mitigating factors. The state judgment was overturned, not under the rule in *Mills*, but under the circuit court's "risk of confusion" rule. That state judgment was entitled to deference, and so should have been upheld unless it was contrary to a prior decision of *this* Court.

3. Deference in name only is not deference.

Respondent argues that the Commonwealth merely disputes the application of the AEDPA deference standard under § 2254 that the circuit court "expressly recognized" (respondent's brief, 3, 5, 29-32, italics omitted).

But quoting the proper standard hardly amounts to following it. Similar "recognition" of AEDPA deference in other cases has warranted reversal, and sometimes summary reversal. *E.g.*, *Brown v. Payton*, 544 U.S. 133, 140 (2005) (circuit court "purported" to decide "under the deferential standard AEDPA mandates," but proceeded to overturn a reasonable state decision); *Bell v. Cone*, 543 U.S. 447, 451-452 (2005) (*per curiam*) (6th Circuit

cited "contrary to" standard but misapplied it).[2]

Respondent stresses that the circuit court was unanimous (respondent's brief, ii, 7, 8, 17), but this kind of unanimity is nothing to brag about. The circuit court has previously denied deference in this same manner. *E.g. Banks v.Horn*, 271 F.3d at 541-542 & n.15 (citing AEDPA but stating that circuit court could decide based on its "independent judgment"); *compare Woodford v. Viscotti*, 537 U.S. 19, 24, 27 (2002) (*per curiam*) (federal court may *not* rely on independent judgment under AEDPA); *Frey v. Fulcomer*, 132 F.3d at 923 (followed by circuit court

---

[2] *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004) (circuit court "considered whether Alvarado could obtain relief in light of the deference a federal court must give to a state-court determination on habeas review" but misapplied that standard); *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (*per curiam*) (circuit court cited correct "objectively unreasonable" standard but in applying it gave "too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials"); *Price v. Vincent*, 538 U.S. 634, 639 (2003) (unanimous court) ("Although the [6th Circuit] Court of Appeals recited [the AEDPA] standard ... it proceeded to evaluate respondent's claim de novo rather than through the lens of § 2254(d)") (citation omitted); Lockyer v. Andrade, 538 U.S. 63, 69 (2003) (circuit court "noted that it was reviewing Andrade's petition under the Antiterrorism and Effective Death Penalty Act" but in fact followed "its own precedent"); *Woodford v. Visciotti*, 537 U.S. 19, 21-25 (2002) (*per curiam*) (circuit court cited the "unreasonable application" standard but in fact "substituted its own judgment for that of the state court").

in *Banks*; finding *Mills* error because in instructions the word "unanimous" was seven words away from word "mitigating"); *see also Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 890 (2008) (after holding *Mills* claim was barred, circuit court nevertheless wrote 2700 words to vindicate its *Banks* decision on the merits under AEDPA); *Abu-Jamal v. Horn*, 520 F.3d at 303-304 (App. 82) (citing *Albrecht*, *Banks*, and *Frey*).

As *Smith v. Spisak* confirms, the same denial of deference arises in other federal appellate courts. Their ongoing failure to grasp the proper standard of review is a national problem, not a local one. This fact warranted certiorari in *Banks* and in *Spisak*, and review is warranted here for the same reason.

The deference requirement would be rendered meaningless if courts could meet it by simply reciting boilerplate, giving lip service to the standard while ignoring its substance. This Court can provide needed guidance to federal courts by correcting this erroneous approach to the deference standard.

4. The state ruling was consistent with mainstream federal appellate decisions.

As shown below, it is clear even from respondent's own arguments that the circuit court followed its "risk of confusion" rule, not the rule in *Mills*. It is equally clear, from how *Mills* has been applied in federal courts, that the state court's

decision was reasonable. *See Carey v. Musladin*, 549 U.S. 70, 76 (2006) (finding denial of deference where "lower courts have diverged widely in their treatment of [similar] claims").

In *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991), the circuit court applied *Mills* to *uphold* a virtually identical Pennsylvania case. The state court expressly relied on *Zettlemoyer* in denying respondent's *Mills* claim. *Commonwealth v. Abu-Jamal*, 30 Phila. 1, 110 (1995) (App. 176).

But when this case reached the circuit court, it turned out differently from *Zettlemoyer* -- not because Pennsylvania changed the way it administered the death penalty, but because the Third Circuit changed its mind (*see* petition for certiorari, 17-21).

The change of mind sets off alarm bells under § 2254. How could the circuit court deem the state decision unreasonable when the state court applied the circuit court's own reasoning?[3]

---

[3] According to respondent there are "vast differences" between the instructions and verdict form in *Zettlemoyer* and those in later Third Circuit decisions that explain the different outcomes (respondent's brief, 25-27, italics omitted). This is nonsense. *In this very case* the Third Circuit itself forthrightly acknowledged the "tension" between *Zettlemoyer* and its later decisions, but declined to resolve this tension or

(continued...)

What makes the circuit court's decision here remarkable is not merely this self- contradiction, but the fact that *Zettlemoyer* was in the mainstream. Federal appellate courts have rejected the arguments relied on by respondent and by the circuit court after its change of mind.

For example, *Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000), *cert. denied*, 534 U.S. 970 (2001), rejected a claim that *Mills* required relief because the proximity of the terms "unanimous" and "mitigating circumstances" implied that mitigating circumstances must be found unanimously. *Compare* respondent's brief, 15 (arguing that "proximity"of words created error); *Abu-Jamal v. Horn*, 520 F.3d at

---

[3](...continued)
discuss its significance under the AEDPA standard. *Abu-Jamal v. Horn*, 520 F.3d at 304, App. 83. Previously, consistent with its "risk of confusion" rule, the circuit court had distinguished *Zettlemoyer* on the ground that, there, the word "unanimous" was 17 words away from "the mitigating circumstances clause," while in *Frey* the word "unanimous" was 7 words away. *Frey v. Fulcomer, supra*, 132 F.3d at 923. *Compare Scott v. Mitchell*, 209 F.3d 854, 875 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (rejecting *Mills* claim even though terms were only 6 words apart); *Noland v. French*, 134 F.3d 208, 213 (4th Cir.) *cert. denied* 525 U.S. 851 (1998) (4 words apart);*Duvall v. Reynolds*, 139 F.3d 768, 792 (10th Cir. 1998) (8 words); *Griffin v. Delo*, 33 F.3d 895, 905 (8th Cir. 1994) (6 words); *Gacy v. Welborn*, 994 F.2d 305, 307 (7th Cir. 1993) (5 words); *Maynard v. Dixon*, 943 F.2d 407, 419 (4th Cir. 1991) (3 words).

303, App. 80-81 (stressing mention of unanimity in "close relation" to discussion of mitigation).

Scott v. Mitchell, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000), held that there was no *Mills* issue where jurors were told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous." *Compare* respondent's brief, 9-10 (claiming that requiring all 12 jurors to sign creates *Mills* error); *Abu-Jamal v. Horn*, 520 F.3d at 303, App. 81 (finding *Mills* error because judge said "your verdict must be unanimous ... It must be the verdict of each and every one of you"); *Smith v. Spisak*, certiorari petition at 7 (6th Circuit found *Mills* error because all twelve jurors had to sign the verdict form).

LaFevers v. Gibson, 182 F.3d 705, 719 (10th Cir. 1999), held that "[a] trial court need not ... expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *Accord Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*). *Compare* respondent's brief at 15 (arguing that *Mills* error arose because instructions "do not even hint" that a mitigation finding "need not be" unanimous); *Abu-Jamal v. Horn*, 520 F.3d at 303, App. 81 (concluding that the instructions did not "distinguish between mitigating and aggravating

circumstances in their application of the unanimity requirement").

Thus, the circuit court effectively requires jurors to be told that unanimity is *not* required in order to avoid the "risk of confusion." Because *Mills* did not so rule, this is a clear violation of the AEDPA deference standard.[4]

This is more than a mere circuit split. The above federal appellate decisions are *objective proof of the reasonableness of the state court's decision.* They were ignored by the circuit court (just as they are now ignored by respondent), even though the AEDPA standard precludes disturbing the state judgment unless it is objectively *unreasonable.* The

---

[4] Consistent with its view that *Mills* concerned jurors' implicit understanding of instructions rather than what the instructions actually say, the circuit court justified this "anti-*Mills* instruction" requirement by citing 486 U.S. at 378-79 (Third Circuit opinion, 520 F.3d at 303, App. 81). But the discussion cited concerned the plausibility of Maryland's proposed saving construction, that jurors might have believed unanimity was required to find *or reject* mitigating circumstances. *Mills* did not hold that an instruction *denying* that unanimity is needed to find mitigation is necessary to avoid constitutional error. Or at least, it is reasonable for a state court to so conclude, because federal appellate courts have consistently done so. *E.g., Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) (*Mills* not violated because instruction did not "state that jurors must 'agree unanimously' on the existence of a mitigating factor").

Congressional intent in § 2254 was to restrict federal habeas relief to aberrant state decisions. Here, the circuit court decision is the aberration.

5. Why this case is important.

Respondent argues that this case is unimportant because *Mills* is unlikely to arise in many Third Circuit cases (respondent's brief, 33 et. seq.). He thus pretends that this case is only about *Mills*, but it is not. This case is about AEDPA deference.

The grant of certiorari in *Smith v. Spisak* establishes that the deference question in these cases is important.

Indeed, this Court's jurisprudence (*see* 6-7 & n.2, *supra*) clearly identifies, *as a national problem,* the inability or unwillingness of circuit courts to grasp that a collateral attack on a state criminal judgment in federal habeas is not an appeal from state courts to federal courts. Circuit courts do not yet understand that, if the case is close, *the habeas claim must fail.* Conversely, a successful claim must be relatively straightforward, because the controlling rule must be *clearly established* and the contrary result *unreasonable.*

Here, respondent produces a 36-page brief in support of the circuit court's own lengthy explanation

of what supposedly was *the only reasonable outcome*. How could it be so difficult to explain the obvious?

This Court has not yet afforded guidance to the Third Circuit with respect to the deference standard. The opportunity arose in *Beard v. Banks*, *supra*, but that case was decided on other grounds.[5] The factual and legal circumstances of these deference cases vary: this case concerns a *Mills* claim, while *Carey v. Musladin*, *supra*, for example, concerned jurors wearing buttons with pictures of the murder victim. It is the AEDPA deference question that matters.

---

[5] The other Third Circuit case in which deference was in issue was *Rompilla v. Beard*, 545 U.S. 374 (2005), but that case may have had the unfortunate effect of *reducing* the apparent import of the standard in this circuit. 545 U.S. at 404-405 (Kennedy, J., with the Chief Justice, Scalia, J., and Thomas, J., dissenting) (concluding that reversal was not only inconsistent with the deference standard but sent the wrong signal to the circuit court).

Conclusion

For the reasons stet forth above, the Commonwealth respectfully requests this Court to grant its petition for writ of certiorari.

Respectfully submitted:

HUGH J. BURNS, Jr.
Chief, Appeals Unit
RONALD EISENBERG
Deputy District Attorney
(counsel of record)
ARNOLD GORDON
1st Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
3 South Penn Square
Philadelphia, PA 19107
(215) 686-5700